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Attention: Mr Roland

Dear Partners

North Coast Children's Home

I refer to your letters dated 8 and 15 February 2007 and to my telephone conversation with your Mr Roland on 15 February 2007. As requested, I have commented below on the without prejudice letters dated 6 February 2007 and 15 February 2007 received by my instructing solicitors from Nicol Robinson Halletts.

Letter dated 6 February 2007

There is no legal reason as to why the Diocese of Grafton should settle these claims for a total of \$950,000.00. I remain of the opinion that neither the Bishop nor the Corporate Trustees of the Diocese of Grafton has any legal liability for the acts and omissions of those who were responsible for the management of the North Coast Children's Home. In considering the offer of settlement the Diocesan Council will need to take into account the fact that the costs that would be incurred by the Diocese of Grafton, allowing for appeals, in a successful application to have any proceedings which are commenced dismissed on the ground that they are statute barred, could easily be in the region of \$100,000.00 to \$150,000.00. Further, there may be the cost of administering, and the amount of financial assistance payable under, the pastoral care and assistance proposal outlined in the letter dated 14 December 2006 from my instructing solicitors to Nicol Robinson Halletts. Any settlement should be contingent on a full release of liability for the Bishop, the Corporate Trustees of the Diocese of Grafton and all who were involved in the management of the North Coast Children's Home by all 41 claimants.

I am not aware of the accuracy of the assertion that an offer of \$70,000.00 has been made by the Diocese of Grafton to an abuse victim consequent upon the prosecution of Mr Kitchingham, and the circumstances of any such action. Even if one or more clergy were convicted of a criminal offence or offences with respect to a former resident or residents of the North Coast Children's Home, this of itself would not give rise to any legal liability on the part of any person or body within the Diocese of Grafton.

If any of the clients of Nicol Robinson Halletts do commence criminal prosecutions against clergy who were licensed by the then Bishop of the Diocese of Grafton, then that is a matter for the client. It is impossible to form a view as to whether such a prosecution would be successful. It is likely that a successful prosecution would cause some reputational damage to Diocese of Grafton.

Again, I am not aware of the accuracy of the assertion that “the Church has forwarded the Statutory Declarations of each and every one of our clients to the Police ... without any of our clients’ authority or permission” and the circumstances of any such action. However, I note that section 316(1) of the *Crimes Act 1900* (NSW) is in the following terms:

“If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.”

A serious indictable offence means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more: *Crimes Act*, s 4. The criminal offences in the *Crimes Act* relating to the physical assault and sexual abuse of children have varied over the period from 1944 to 1991 (the earliest and latest years of residence disclosed in the summary of statements enclosed in the letter dated 26 September 2006 from The Rev’d Pat Comben, Registrar of the Diocese of Grafton, to my instructing solicitors). Some of these offences are punishable by a term of imprisonment for a term of five years or more. It is likely that in the case of at least some of these Statutory Declarations our client had a statutory obligation under s 316(1) of the *Crimes Act* to bring this information to the attention of the Police Force.

I did not understand the reference to “potential fines for breach of privacy”. A Privacy Commissioner for New South Wales is appointed under the *Privacy and Personal Information Protection Act 1998* (NSW), but that Act does not apply to the applicable person or body within the Diocese of Grafton. Similarly, a Privacy Commissioner for the Commonwealth is appointed under the *Privacy Act 1988* (Cth), but it is very doubtful that that Act applies to the applicable person or body within the Diocese of Grafton.

Letter dated 15 February 2007

I do not accept the premise underlying the assertion that “the present claims, if litigated, would clarify a number of areas of law relating to the role of the Anglican Church in terms of delegable duties and the legal status of the Diocese.” In my opinion the applicable Bishop had, nor the Corporate Trustees of the Diocese of Grafton has had, a significant measure of control over, or assumed responsibility for, the management of the North Coast Children’s Home, such that it would be liable in tort for the acts or omissions of staff members and chaplains.

It is correct that in their joint judgment Gummow, Hayne, Heydon and Crennan JJ made the quoted statement: *Davidson v Queensland* (2006) 80 ALJR 946 at [22]. However, even if the current Bishop or the Corporate Trustees of the Diocese of Grafton could be legally liable in tort to the claimants, on the basis of my instructions there was no knowledge or suspicion of the alleged abuse by either.

The belief that “the legal role and position of the Primate will also be of relevance” is misplaced. The authority of the Primate is specified in the Constitution and various Canons of the Anglican Church of Australia., and does not include responsibility for the affairs of the Diocese of Grafton.

Similarly, the belief that “the artificiality or otherwise of the Diocesan model in relation to liability of the Church as an entity and what could be described as legal boundary settings between diocese” is misplaced. The structure of the principal persons and bodies within the Diocese of Grafton is found in the *Anglican Church of Australia Constitutions Act 1902* (NSW), the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia Act 1961* (NSW).

The threats of appeals and costs should be viewed in perspective. The principles with respect to legal liability in tort for various organs of the Anglican Church are well settled. The allegations are very different to those in *Davidson v Queensland* and recent abuse cases involving the Roman Catholic Church. Of course, it is unlikely that the prospective defendants, if they wish to do so, could recover costs from the unsuccessful plaintiffs.

It is unlikely that any evidence of Dr Rodger Austin will be admissible in any such proceedings. Firstly, I cannot see how any issue of Canon Law will arise. Secondly, even if this issue does arise, Dr Austin would not have “specialised knowledge” within s 79 of the *Evidence Act 1995* (NSW) of the Canon Law of the Anglican Church of Australia and its predecessor the Church of England.

Counselling will be available to the claimants under the offer made in the letter dated 14 December 2006 from my instructing solicitors to Nicol Robinson Halletts.

The requested undertakings should not be given. While I am not aware of the documents that are generated in the course of the financial management of the Diocese of Grafton, the undertaking would require the preservation of every such document. In any event, no reason has been provided as to why such an undertaking should be given. Further, it is not clear from which person or body the undertaking is being sought.

Yours faithfully



GARTH BLAKE S.C.